

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

JUSTIN GARDNER,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

**8:17CV255**

**MEMORANDUM  
AND ORDER**

This matter is before the court on the Notice of Appeal ([filing no. 34](#); [filing no. 34-1](#)) filed by Petitioner on November 20, 2018. Petitioner seeks to appeal the court's Memorandum and Order and Judgment entered on March 1, 2018, dismissing Petitioner's habeas petition without prejudice for failure to amend his petition as ordered by the court. (Filing Nos. [21](#) & [22](#).) Also before the court is a memorandum from the Clerk of the Court requesting a ruling as to Petitioner's authorization to proceed in forma pauperis on appeal. ([Filing No. 36](#).)

Petitioner has failed to include the \$505.00 appellate filing and docket fees. Petitioner has not previously been granted leave to proceed in forma pauperis in the district court in connection with his § 2254 petition. Thus, [Fed. R. App. P. 24\(a\)\(3\)](#), which continues in forma pauperis status on appeal without further authorization, does not apply. "An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." [28 U.S.C. § 1915\(a\)\(3\)](#). The court hereby certifies that the appeal filed by Petitioner in this case is frivolous and not taken in good faith for the following reasons: (1) Petitioner has already prosecuted an appeal to the Eighth Circuit Court of Appeals which the Court dismissed for lack of jurisdiction on June 6, 2018 ([filing no. 31](#); *see also* [filing no. 33](#)); (2) Petitioner's appeal is grossly untimely as it was filed more than eight months after this court entered judgment; and (3) Petitioner has another habeas action pending at Case Number 8:18CV241 challenging the same state-

court conviction that was the subject of this closed habeas matter. Since the appeal is not taken in good faith, Petitioner cannot file an appeal in forma pauperis. *See* [Fed. R. App. P. 24\(a\)\(3\)](#) and [28 U.S.C. § 1915\(a\)\(3\)](#).

IT IS THEREFORE ORDERED that Petitioner may not proceed on appeal in forma pauperis.

Dated this 27th day of November, 2018.

BY THE COURT:

*s/ Richard G. Kopf*  
Senior United States District Judge